

1
2
3
4
5
6
7 **UNITED STATES DISTRICT COURT**
8 **FOR THE WESTERN DISTRICT OF WASHINGTON**

9
10
11 DONALD MCFADDEN, individually and on
12 behalf of all others similarly situated,

13 Plaintiff,

14 v.

15 MICROSOFT CORPORATION,

16 Defendant.

Cause No.:

CLASS ACTION COMPLAINT

JURY TRIAL DEMANDED

17 **CLASS ACTION COMPLAINT**

18 Plaintiff, Donald McFadden, (“Plaintiff or “Mr. McFadden”), individually, and on behalf of
19 all others similarly situated, brings this action against the Microsoft Corporation (“Microsoft”).
20 Plaintiff’s allegations are based upon personal knowledge and belief as to his own acts and upon
21 information and belief and the investigation of his counsel as to all other matters.

22 **I. NATURE OF THE ACTION**

23 1. This is a class action lawsuit brought against Microsoft Corporation by Plaintiff on behalf
24 of himself and all others similarly situated who purchased wireless, Microsoft-brand Xbox One
25 controllers. These wireless Microsoft-brand Xbox One controllers are defective. The
26 potentiometer within the joystick component—the mechanism that translates the physical

1 movement of the thumbstick into movement within the video game—contains a design flaw such
2 that the wiper component of the potentiometer scrapes resistive material off a curved track,
3 which then adheres to the wiper causing unwanted electrical contact, or movement, without input
4 from the user. Once this damage occurs, the joystick registers phantom input or stick drift,
5 thwarting accurate gameplay. Accurate gameplay is the central purpose of video game
6 controllers.

7 2. Microsoft manufactures these controllers and markets them as superior controllers that
8 enhance game play while failing to disclose the joystick defect that interferes with proper game
9 functioning. Consumers who purchase wireless, Microsoft-brand, Xbox One controllers pay
10 more for the controllers than they are worth, and more than they would pay if they were non-
11 defective.

12 3. Defendant has been made aware of the defect through online consumer complaints
13 beginning as early as 2014. Defendant was also aware of this defect through its own records of
14 complaints and warranty requests, as well as its own pre-release testing.

15 4. Despite this knowledge, Defendant failed to disclose the defect and routinely refuses to
16 repair the controllers without charge when the defect manifests. Unlike the warranty on their
17 Xbox game consoles, which lasts a year, the warranty on their controllers is just 90 days.

18 5. As a result of Defendant's unfair, deceptive, and/or fraudulent business practices, owners
19 of wireless, Microsoft-brand Xbox One controllers, including Plaintiff, have suffered an
20 ascertainable loss. As a result of Microsoft's deceptive conduct, Plaintiffs paid more for the
21 wireless, Xbox One controllers than they are worth and than they would have had Defendant
22 disclosed the defect; spent money and time repairing and managing defective controllers and/or
23 buying replacement controllers; and otherwise have been harmed by Defendant's conduct.

24 6. Accordingly, Plaintiff brings this action to redress Defendant's violation of
25 Washington Consumer Protection Act, Wash. Rev. Code § 19.86.010 et seq. (the "CPA").
26 Plaintiff seeks to certify a National Class for the unfair and deceptive practices Defendant, a

Washington corporation, directed at out-of-state and in-state residents and further seeks injunctive relief, actual damages, treble damages, reasonable attorneys' fees, and other relief the Court deems just.

II. JURISDICTION AND VENUE

7. The Court has jurisdiction over Plaintiff's claims under 28 U.S.C. 1332(d)(2) ("CAFA"), because (a) there are 100 or more Class members, (b) at least one Class member is a citizen of a state that is diverse from Defendant, and (c) the matter in controversy exceeds \$5,000,000, exclusive of interest and costs.

8. Venue is proper in this District under 28 U.S.C. 1391(b)(1) and 1391(c)(2) because the Defendant resides in this District, is subject to personal jurisdiction in this District, and transacts business in this District. Additionally, Defendant has advertised and received substantial revenue from sale of its products, including the wireless, Xbox One controllers, within this District.

III. PARTIES

Plaintiff

9. Plaintiff Donald McFadden is a citizen of the state of New York, and resides in Binghamton, New York.

10. Mr. McFadden considers himself an avid gamer and often plays video games after work to unwind. He has owned multiple Microsoft gaming products, including special edition versions of the standard controller and the Elite Controller.

11. Mr. McFadden first heard about the Elite Controller in 2015 while watching E3, a large gaming convention, at which Microsoft presented its new controller.¹ He was drawn to the Elite Controller's many features. Specifically, Mr. McFadden appreciated the Elite controller's promised ability to enhance the experience of First Person Shooter ("FPS") games—his preferred games. It is not a surprise that Plaintiff was drawn to the Elite Controller—it was designed and

¹ Jenna Pitcher, E3: 2015: Microsoft Showcases New Xbox Elite Controller, IGN, May 15, 2014 (updated May 2, 2017), <https://www.ign.com/articles/2015/06/15/e3-2015-microsoft-showcases-new-xbox-elite-controller> (last visited April 14, 2020).

1 marketed specifically for people like him. However, Defendant's presentation at the 2015 E3
2 omitted any mention of a defective joystick.

3 12. Shortly after learning about the controller, he purchased an Xbox One/ Elite Controller
4 bundle at a GameStop in the Oakdale Mall in Johnson, NY. He already had an Xbox One with
5 more storage but bought the bundle specifically for the Elite Controller.

6 13. At first, Plaintiff enjoyed the new controller. Always careful with his gaming
7 equipment, Mr. McFadden was no less so with this expensive controller. He consistently placed
8 the controller back on the charger when he was finished, taking care to never drop it or leave it
9 laying on the floor. About once a week, he wiped it with cloth after playing to remove his
10 fingerprints from the matte black finish.

11 14. Despite this care, after some time, he noticed the joystick on the controller had
12 started to drift, causing movement without his input.

13 15. Eventually, the stick drift so interfered with gameplay that in 2017 Plaintiff
14 purchased a second Elite Controller in 2018.

15 16. This second Elite Controller was purchased new from an online retailer and cost
16 approximately \$160.

17 17. Again, Plaintiff enjoyed the features of the Elite Controller, but in three or four months,
18 the joystick started to drift.

19 18. A knowledgeable gamer, Plaintiff spent a considerable amount of time attempting to
20 fix the defect on his own. He spent three or four hours—in a least three games—doing the
21 intricate work of manipulating the dead zones. But after at least twelve hours playing with these
22 settings, his controllers continued to drift without any manual input.

23 19. Users can also manipulate the joystick sensitivity outside of specific games in the Xbox
24 settings; Mr. McFadden spent another three or four hours in these settings to no avail.

25 20. Because he now had two non-functioning Elite Controllers, in 2019, Mr. McFadden
26

1 ordered a repair kit off Amazon to facilitate a manual fix on his first controller. Using a video he
2 found on the internet devoted to fixing stick drift on Xbox One controllers, Mr. McFadden
3 opened the controller and attempted to fix it with hot glue and a toothpick. Though he was under
4 the impression such home repair might void the warranty, and believed the short warranty had
5 already expired, he figured he had nothing to lose. The home-repair did not fix the issue,
6 however.

7 21. Stick drift interfered with Mr. McFadden's gameplay on multiple levels. First, at the skill
8 level, Mr. McFadden had to compensate for drift—and this with a controller that promised
9 superior game play and cost \$160 dollars. Second, for Mr. McFadden, evening gameplay is a
10 time to decompress from work, but the stick drift turned this time into a source of annoyance.

11 22. Therefore, also in 2019, Mr. McFadden bought basic \$20 dollar wired
12 controllers from Walmart and began using them instead of the much more expensive Elite
13 Controllers.

14 23. Mr. McFadden would not have bought the Xbox Elite Bundle or the second Elite
15 Controller had he known about the stick drift defect. Instead, he would have purchased a less
16 expensive controller that allowed him to game without the need to constantly compensate for the
17 stick drift. In fact, this is what he eventually did. If Microsoft fixed the defect in its wireless
18 Xbox One Controllers, Mr. McFadden would purchase one.

19 **Defendant**

20 24. Microsoft Corporation is incorporated in the state of Washington and maintains
21 its principal place of business at One Microsoft Way, Redmond, Washington 98052-6399.
22 According to their 2019 Annual report, Microsoft's main research and development facilities are
23 located in Redmond, Washington. The Redmond Microsoft campus employs over 50,000 people,
24 comprises 520 acres, 5 million square feet of additional leased space, and is used for engineering,
25 sales, marketing, operations and other administrative purposes.

26 25. Microsoft's corporate policies and practices, including those relating to the design,

1 testing, marketing, and customer care for the Xbox One and compatible controllers has been
 2 centered in Washington: the Xbox was invented at the Redmond campus², the Entertainment and
 3 Devices division is housed on the Redmond campus, where the head of the gaming division,
 4 among other key executives, works³ and where hardware for the Xbox One is prototyped.⁴
 5 Journalists are invited to tour the Redmond gaming facilities to speak with gaming executives or
 6 for grand promotional events; these articles are published and read by consumers as marketing
 7 materials. For example, for the launch of the Xbox One in 2013, Microsoft invited reporters to
 8 the Redmond campus for an Xbox One reveal event where journalists witnessed the 3d printers
 9 that print the controller prototypes, visited the hardware testing center where a robot pushes each
 10 button on the controller 3 million times, and played with the new “rumbling” controllers in a
 11 special play station.⁵

12 26. Washington state is a hub in the video game world with over 400 gaming
 13 companies and 20 billion dollars in revenue in 2016. Microsoft’s unfair and deceptive
 14 practices interfere with fair and honest competition in this immensely important economy in
 15 Washington state.

16 **IV. FACTUAL BACKGROUND**

17 27. Microsoft launched the Xbox One in 2013 as a successor to the Xbox 360.⁶

18
 19 ² “[O]n the company’s campus, in Building 27 and Building 5, a ‘garage shop’ game console was
 20 taking shape...” The Ultimate History of Video Games: Volume Two: From Pong to Pokemon
 21 and Beyond—The Story Beyond the Craze That Touched Our Lives and Changed Our World.
 22 Steven L. Kent.

³ <https://www.gameinformer.com/b/news/archive/2013/09/05/microsofts-phil-spencer-on-xbox-one-pre-orders-demystifying-the-cloud-and-wooing-indies.aspx>

⁴ <https://www.businessinsider.com/microsoft-headquarters-photos-2016-12#and-this-sweet-food-court-18>

⁵ <https://arstechnica.com/gaming/2013/05/my-day-in-redmond-a-brief-look-at-microsofts-xbox-campus/>

⁶ In 2016, Microsoft unveiled the Xbox One S, which allowed for, among other things 4K video streaming. In 2017, the company came out with the Xbox One X, a high-end model of the company’s gaming console. Microsoft discontinued the original Xbox One after introducing the Xbox S. They have announced plans for a fourth-generation gaming system, the Xbox Series X, to be available in late 2020. The controllers at issue in the complaint are compatible with all Xbox One models and the term Xbox is used generally to refer to all models, unless otherwise specified.

1 28. Since the launch of the Xbox One, consumers have been able to purchase
 2 controllers either with the gaming system (in a bundle) or separately (as a stand-alone purchase).
 3 This practice continues to the present.

4 29. Today, the basic Xbox One wireless controller starts at about \$50. Extra features
 5 or special designs can bring the price closer to \$80.

6 30. Microsoft also produces and sells an Elite wireless controller, which it brought to
 7 market in 2015. In 2019, Microsoft began selling an Elite Series 2 controller.⁷ This controller is
 8 currently sold for \$179.99 and is the one of the most expensive controllers on the market.

9 31. Microsoft sells its controllers with a warranty of only 90 days. Even when
 10 consumers purchase an Xbox One bundle, Microsoft warranties the console for one year but
 11 limits the warranty for the controllers to 90 days.

12 32. From the beginning, Microsoft has marketed the Xbox One controllers as an
 13 indispensable component of a preeminent gaming system.

14 33. The 2013 trailer for the Xbox One lingers on the wireless controller. Close ups
 15 emphasize the joysticks and buttons as the words “Ultimate Precision” appear on the screen.⁸

16 34. The Elite controllers are described by Microsoft as the “world’s most advanced
 17 controller” with “every detail [] designed to meet the demands of the competitive gamer.”⁹ In
 18 2015, the Xbox division head described the Elite controller as “an elite controller for the elite
 19 gamer.”¹⁰

20 35. The Elite controllers are fully customizable. Using the linked app, the user can
 21 reassign buttons, adjust trigger values, personalize thumbstick sensitivities, and save customized
 22 settings for different games, among other things.

23 _____
 24 ⁷ This complaint refers to the Elite controllers generally. The Elite Series 2 model is an upgrade
 25 to the first-edition Elite, but Microsoft marketed them similarly. Mr. McFadden purchased two
 26 first-edition Elite controllers.

⁸ <https://www.youtube.com/watch?v=LIYeHCFtMc>

⁹ <https://www.xbox.com/en-US/xbox-one/accessories/controllers/elite-wireless-controller>

¹⁰ <https://www.theverge.com/2015/6/15/8783211/microsoft-xbox-one-elite-wireless-controller-announced-e3-2015>

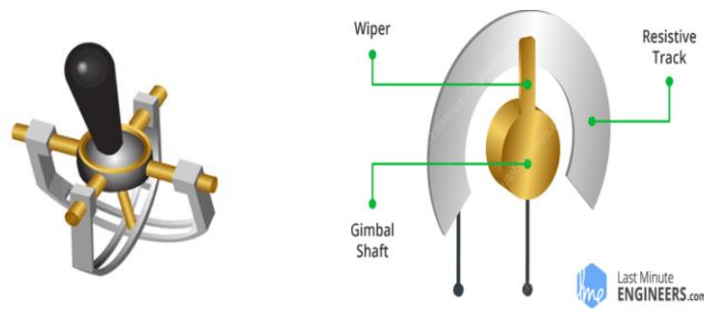
1 36. A two-minute video produced by Microsoft and uploaded to its website for the
 2 Elite controllers entitled “The World’s Most Advanced Controller” consists of serious gamers
 3 gushing over the Elite controllers’ enhanced play capabilities. Various “Xbox MVPs” and game
 4 managers laud the controller:

- 5 • “a must for any shooter;”
- 6 • “you have a natural advantage there;”
- 7 • “my tool of the trade;”
- 8 • “there is no other option;”
- 9 • “the controllers really help close the skill gap with other players;”
- 10 • “it helps my game;”
- 11 • “you can give it your personality;” and,
- 12 • “the moment you use the Elite controller, it puts the entire experience at a new
 13 level.”¹¹

14 37. Despite Microsoft’s representations that its wireless controllers enhance the
 15 gaming experience, its wireless, Xbox One controllers are defective, and Microsoft fails to
 16 disclose their defect in marketing or communications with consumers.

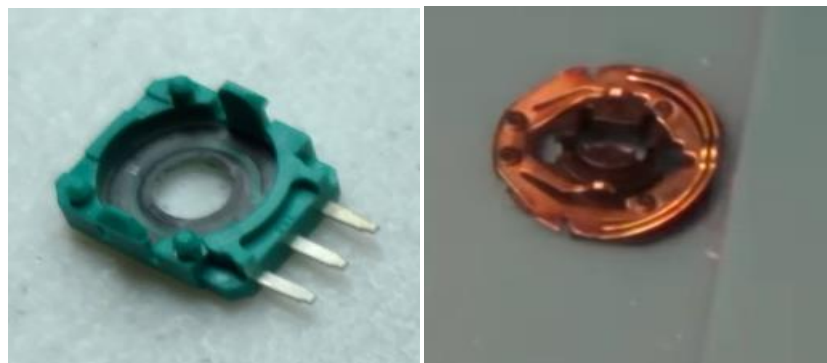
17 38. Both the basic Xbox One controllers and the Elite controllers—despite the
 18 abundance of new features—consist of the same gimbal-design, joystick component. Moving the
 19 thumb stick pushes a narrow rod that sits in two slotted shafts: forward and backwards affects
 20 movement on the Y-axis; left to right, affects movement on the X-axis.

21
22
23
24
25
26 ¹¹ <https://www.youtube.com/watch?v=kkPN55JNOnY>



39. A potentiometer is connected to each joystick shaft, as well as the controller's circuit board and works as an electrical circuit. Each potentiometer consists of a curved, resistive track and a contact arm. Moving the contact arm increases or decreases the electrical current flowing through the circuit. The stick's physical position is translated into an electrical signal, which is then converted into a digital reading that can be read by the operating system.

40. The picture below shows the kind of potentiometer used in Xbox One controllers. The component on the left is the curved, resistive track (in a plastic case); the piece on the right is the wiper that runs along it. The joystick shaft connects to the wiper so that moving the joystick causes the wiper to run against the resistive track.



41. In Xbox One controllers, the potentiometers contain a design flaw such that the wiper component scrapes resistive material from the curved track, which then adheres to the wiper causing unwanted electrical contact without input from the user. Once this damage occurs, the joystick registers phantom input or stick drift, thwarting accurate gameplay.

42. Thus, the controllers do not offer “ultimate precision” or “a natural advantage” over other players; instead, users must compensate for the stick drift when gaming, which diminishes performance and detracts from the experience—a fact Microsoft fails to disclose to would-be purchasers.

Widespread and Enduring Stick Drift Complaints from Consumers

43. Plaintiff’s experiences with stick drift are not isolated. Indeed, a large volume of consumers have been complaining about stick drift on Xbox One controllers since at least 2014. A simple Google search on this issue reveals multiple forum and message boards dedicated to stick drift; YouTube instructional videos of users attempting to fix the issue on their own; and even replacement joystick components from Amazon and other sellers.

44. Consumer complaints about stick drift refer to multiple Xbox controllers, including the standard and Elite models. A sampling of these complaints is presented below:

BadBoyzFastToyz, GameSpot, Game FAQs, Xbox One Board, approximately 2/11/2019¹²

I’ve had issues on FPS games mostly, and ruined over 4 controllers. One of the main reasons I won’t buy an Elite Controller. The system might be great but the controllers went to the lowest bidder and it shows. At least PS3 and PS4 controllers were built better. Never ruined any of them like I do on the 360 and x1. Average, I go through one a year or 2,000 hours of gameplay.

@Whittaker506, ifixit.com, 7/24/2018¹³

Hey guys! I've been having bad upwards stickdrift on my right stick, so I took it apart and adjusted it to nearly completely remove it. It was fine. A bit of tiny downwards drift, but barely noticeable. Not long after, the drift has returned. I going to have to rip it apart and asjust sever times a day, or am I just doing it wrong?

SinperLongshot 0, bungie.net 4/8/17¹⁴

Does anyone know how to fix Xbox One controller Drift?

I was playing Destiny last night and it started drifting upwards pretty badly.

¹² <https://gamefaqs.gamespot.com/boards/691088-xbox-one/77344829?page=1>

¹³ <https://www.ifixit.com/Answers/View/503130/Stick+drift+persistence+after+adjusting+the+sticks>

¹⁴ <https://www.bungie.net/en/Forums/Post/224628424>

I've searched a few fixes but none of them work. Any ideas?

Edit: Thanks for the suggestions but I just went ahead and bought a new one.

45. Many users describe disassembling their controllers and attempting to fix the problem themselves.

LordNazo, Reddit, "How I Fixed my Stick Drift," approximately May 2019¹⁵

With my first controller, the stick drift only got worse to the point where I couldn't use it anymore, so after buying my second controller and using it (assuming the first controller was just defective), the 2nd controller also started drifting. As soon as I noticed this, I found the video you mentioned and decided to test this "fix" that involved breaking off the gray piece of the joystick component on my first controller since it already past the point of no return. Of course, it only made the input worse, so I opened my 2nd controller and decided to glue that gray panel on the left side of the joystick component, which I noticed was not very tight, like it loosened over time.

I still experience some irritating stick drift, but it's been effective at preventing the drift from become worse.

46. The problem is so common, there are at least two dozen YouTube tutorials dedicated to fixing stick drift in Xbox controllers. These DIY videos often suggest either cleaning or replacing the potentiometer wiper, one or both potentiometers, or replacing the analog sensor (joystick component) altogether. Both the analog sensor as a unit, and the potentiometers individually, are soldered to the motherboard, so replacing these parts requires removing solder in order to pull out the defective parts and re-soldering after a new component (often ordered from a third-party seller for a few dollars) has been inserted. This is intricate and dangerous work that many do without gloves or without any apparent ventilation for any smoke coming off the solder point, which is toxic. The analog sensor component is attached to the motherboard at 14 points, and this DIY fix requires time, expertise and additional equipment. Many decide this is still better than shelling out another \$55-180 for a controller that will only start to drift again.

¹⁵https://www.reddit.com/r/xboxone/comments/ag6w7f/how_i_fixed_my_stick_drift/

Microsoft's Knowledge of the Defect

47. Consumers have also posted multiple complaints in the Microsoft forums, which reveal Microsoft has been aware of the stick drift issue for many years:

Boomerb1, Microsoft forum, 5/22/2016¹⁶

I have had my console for under a year and recently the left analog stick has started to drift and is starting to make game unplayable because my controller won't stop moving my person forward unless I am constantly pushing the stick back. I have never done anything crazy with the analog stick, it has received mild use over the past couple months. I am really disappointed with Microsoft and that they cannot make a reliable controller that lasts.

Jjfats, Microsoft form, 5/9/19¹⁷

I am so sick of and tired of every xbox one controller that I have starts drifting up. I have been a loyal xbox player for over 10 years. I own three Xbox one's and have spent many hours fighting with drifting controllers. Eventually every controller starts to drift and most after 2 months of playing. I am sick of paying for a new controller all the time. What are you guys doing about this? I will stop playing Xbox in total and go to playstaion if you guys can not fix this issue.

SkyRim Legend21, Microsoft Forum, 10/12/2019¹⁸

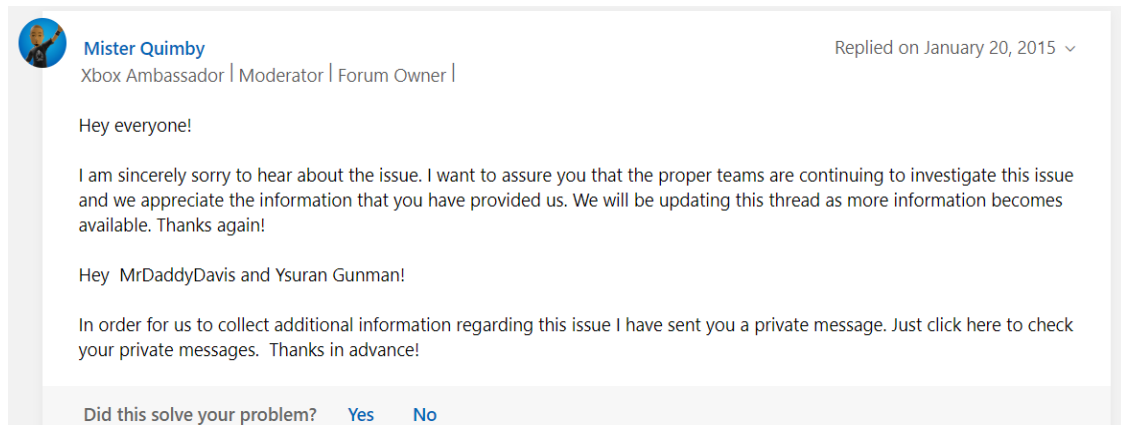
I think this is familiar too everyone who owns xbox and to be honest its getting on my nerves, anyone unfamiliar with this allow me to explain, xbox controllers can start drifting up down left or right without any pressure, and it may look like its stuck but oh how wrong you are, your right sticks busted, and if you deside too deal with it it'll make games even more difficult to play, for example fps, its essential for you too focus your aim in any fps but with the drift problem it makes it way harder too, now i know the mods at Microsoft can't fix this but at least try to get the problem known around the place so the manufacturers are aware too fix it, and i know alot of friends with the same drift problem, so please just fix these defective controllers, for everybodys sake. Edit* overall even if your a pure brute to it or your so careful you treat it like a bomb they seem to break just as fast as they get bought, i hope they make the controllers better as they move on.

¹⁶ <https://answers.microsoft.com/en-us/xbox/forum/all/xbox-one-controller-left-analog-stick-drift/204cb475-f4fe-4dd7-b41d-7c0b125d5ee1>

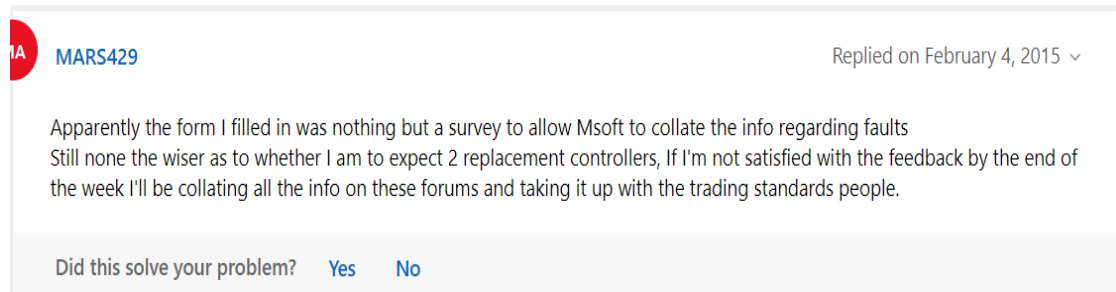
¹⁷ <https://answers.microsoft.com/en-us/xbox/forum/all/xbox-controller-drifting/fd94fa45-7621-494a-be28-ea0e1ca2564d>

¹⁸ <https://answers.microsoft.com/en-us/xbox/forum/all/right-stick-drifting/48a767de-1599-4ae5-9d31-3afefbbc999a?page=2>

48. One thread on the Microsoft forum, “Xbox One Controller Drifting Up,” posted October 10, 2014 is 105 pages long and contains over 1000 posts. A Microsoft “Ambassador”¹⁹ chimes in occasionally, noting he has sent a private message to the poster.²⁰



49. Replies later in the thread indicate the private messages contained surveys asking for information regarding their controller issues, revealing that Microsoft was not only aware of the issue but collecting detailed information from users as far back as 2014.²¹



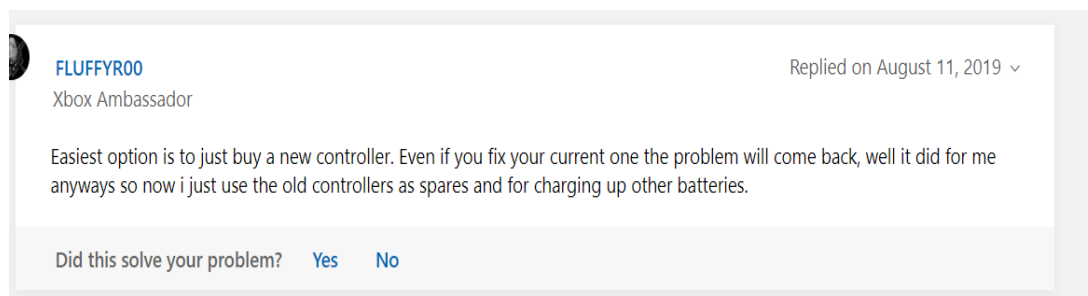
50. Notably, many of the responses to the stick drift complaints on these Microsoft boards advise buying a new controller as the only solution.²²

¹⁹ An Xbox Ambassador is an individual who has volunteered to assist Microsoft with certain customer support functions in exchange for perks. Statements and representations made by Ambassadors can be attributed to Microsoft since the Ambassadors must be approved by Microsoft to earn the title and their support activities are monitored by Microsoft.

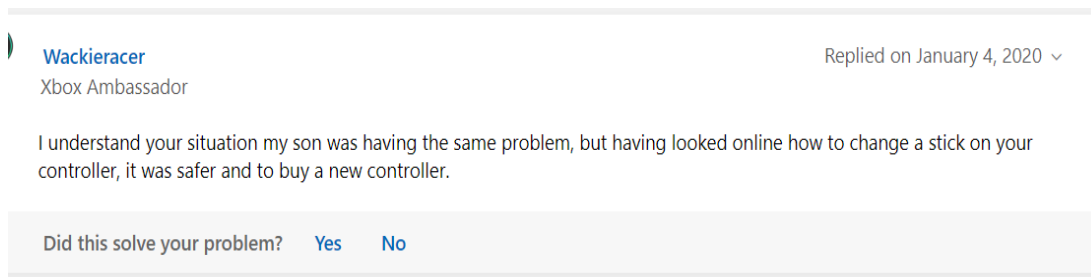
²⁰ https://answers.microsoft.com/en-us/xbox/forum/xb_console/xbox-one-controller-drifting-up/999d72d5-e8e8-48b8-8458-6a5faad378a3?page=16

²¹ https://answers.microsoft.com/en-us/xbox/forum/xb_console/xbox-one-controller-drifting-up/999d72d5-e8e8-48b8-8458-6a5faad378a3?page=22

²² <https://answers.microsoft.com/en-us/xbox/forum/all/xbox-one-x-controller-drift-issue/76410fca-0a99-443b-b70f-03a4c3d809e6>



51. Indeed, even in 2020, “Xbox Ambassadors” on the Microsoft forums are still recommending simply replacing the controller.²³



V. CLASS ACTION ALLEGATIONS

52. Plaintiff brings all counts, as set forth below, on behalf of himself and as a class action, pursuant to the provisions of Rule 23 of the Federal Rules of Civil Procedure, on behalf of a Nationwide Class defined as:

All persons in the United States who bought any model of a wireless, Microsoft-brand, Xbox One controller.

53. Excluded from the Class and Subclass are Defendant and its affiliates, parents, subsidiaries, employees, officers, agents, and directors. Also excluded is any judicial officer presiding over this matter and the members of their immediate families and judicial staff.

54. Certification of Plaintiff’s claims for class-wide treatment is appropriate because Plaintiff can prove the elements of their claims on a class-wide basis using the same evidence as would be

²³ <https://answers.microsoft.com/en-us/xbox/forum/all/controller-stick-drift-needs-recalibration/fc535df6-6e18-40e7-a40a-14f306454ce4>

1 used to prove those elements in individual actions alleging the same claims.

2 55. **Numerosity**—**Federal Rule of Civil Procedure 23(a)(1)**. The members of the
 3 Class are geographically dispersed throughout the United States and are so numerous that joinder
 4 of all Class members would be impracticable. On information and belief, Class members number
 5 in the hundreds of thousands.

6 56. **Commonality and Predominance**—**Federal Rule of Civil Procedure 23(a)(2)**
 7 **and 23(b)(3)**. Common questions of law and fact exist as to all Class members and predominate
 8 over questions affecting only individual Class members. Such common questions of law or fact
 9 include, inter alia:

- 10 a. Whether Defendant engaged in the conduct discussed herein;
- 11 b. Whether wireless Xbox controllers are defective;
- 12 c. Whether the defect is material to a reasonable consumer;
- 13 d. Whether Defendant placed the wireless, Xbox One controllers in the stream of
- 14 commerce in the United States with knowledge of this defect;
- 15 e. Whether Defendant knew or should have known about the defect and, if so, when
- 16 Defendant became aware of the defect;
- 17 f. Whether Defendant knowingly failed to disclose the existence and cause of the
- 18 defect;
- 19 g. Whether Defendant violated consumer protection statutes;
- 20 h. Whether Plaintiff and Class overpaid for their wireless, Xbox controllers in light
- 21 of the defect;
- 22 i. Whether Plaintiff and Class Members are entitled to damages as a result of
- 23 Defendant's conduct alleged herein, and if so, the amount or proper measure of
- 24 those damages; and
- 25 j. Whether plaintiff and Class Members are entitled to equitable relief, including but
- 26 not limited to injunctive relief, including public injunctive relief as provided

under Washington law.

57. **Typicality—Federal Rule of Civil Procedure 23(a)(3):** Plaintiff's claims are typical of the claims of the other Class members because, among other things, all Class members purchased a wireless, Xbox One controller, either individually or in a bundle. Defendant engaged in a common course of conduct giving rise to the legal rights sought to be enforced by Plaintiff, on behalf of himself and other Class members. Plaintiff and all Class Members have the same claims related to the same conduct alleged herein, and Plaintiff and all Class Members sustained economic injury arising out of Defendant's wrongful conduct in selling and failing to remedy the defective, wireless, Xbox One controllers. Further, there are no defenses available to Defendant that are unique to Plaintiff.

58. **Adequacy of Representation—Federal Rule of Civil Procedure 23(a)(4).** Plaintiff is an adequate Class representative because his interests do not conflict with the interests of the other Class members he seeks to represent, he has retained counsel competent and experienced in complex class action litigation, and Plaintiff will prosecute this action vigorously. The Class' interests will be fairly and adequately protected by Plaintiff and his counsel.

59. **Insufficiency of Separate Actions—Federal Rule of Civil Procedure 23(b)(1).** Absent a representative class action, members of the Class would continue to suffer the harm described herein, for which they would have no remedy. Even if separate actions could be brought by individual consumers, the resulting multiplicity of lawsuits would cause undue hardship and expense for both the Court and the litigants, as well as create a risk of inconsistent rulings and adjudications that might be dispositive of the interests of similarly situated consumers, substantially impeding their ability to protect their interests, while establishing incompatible standards of conduct for Microsoft. The Class thus satisfies the requirements of Fed. R. Civ. P. 23(b)(1).

60. **Superiority—Federal Rule of Civil Procedure 23(b)(3).** A class action is

1 superior to any other available means for the fair and efficient adjudication of this controversy,
2 and no unusual difficulties are likely to be encountered in the management of this class action.
3 The damages or other financial detriment suffered by Plaintiff and the other Class members are
4 relatively small compared to the burden and expense that would be required to individually
5 litigate their claims against Microsoft, so it would be impracticable for Class members to
6 individually seek redress for Microsoft's wrongful conduct. Even if Class members could afford
7 individual litigation, the court system could not. Individualized litigation creates a potential for
8 inconsistent or contradictory judgments and increases the delay and expense to all parties and the
9 court system. By contrast, the class action device presents far fewer management difficulties and
10 provides the benefits of a single adjudication, economy of scale, and comprehensive supervision
11 by a single court.

12 61. In the alternative, to certification pursuant to Rule 23(b)(3), Plaintiff submits that
13 certification is proper as to certain issues pursuant to Rule 23(c)(4).

14 **ESTOPPEL FROM PLEADING AND TOLLING OF**
15 **APPLICABLE STATUTES OF LIMITATIONS**

16 62. Microsoft had prior knowledge and information, much of which in its exclusive
17 possession from product testing and validation, about the stick drift defect at issue before
18 Plaintiff and class members knew or could have known.

19 63. Microsoft is estopped from relying on any statutes of limitation or repose due to
20 its acts of concealment. Microsoft knew about the defect for years, but concealed it and/or failed
21 to alert purchasers or potential purchasers. Defendant maintained exclusive control over
22 information concerning the known, but non-public, defect and the number of class devices at
23 issue; Plaintiffs and class members, therefore, could not reasonably have known about the
24 existence of the defect or the number of class devices affected. Thus, Defendant is estopped
25 from relying on any statutes of limitations or repose that might otherwise be applicable to the
26 claims asserted herein.

VI. CAUSES OF ACTION

COUNT I

**(Violation of the Washington Consumer Protection Act, Wash. Rev. Code. Ann. §
19.86.010 *et seq.*)**

64. Plaintiff, individually and on behalf of the Class, repeats and realleges the foregoing paragraphs as though fully set forth herein.

65. The Washington Consumer Protection Act, Wash. Rev. Code § 19.86.010 *et seq.* (the “CPA”) prohibits unfair and deceptive acts or practices in the conduct of any trade or commerce.

66. Defendants are “persons” within the meaning of the Washington Consumer Protection Act (“WCPA”), Wash. Rev. Code § 19.86.010(1), and conduct “trade” and “commerce” within the meaning of the CPA § 19.86.010(2).

67. Plaintiff McFadden and members of the Class are “persons” within the meaning of the WCPA, Wash. Rev. Code § 19.86.010(1).

68. By reason of the conduct alleged herein, Defendant engaged in unlawful, unfair, and deceptive practices within the meaning of the CPA.

69. Defendant engaged in materially misleading acts and practices by marketing and representing their wireless, Xbox controllers were functional, superior products that enhanced gameplay while failing to disclose a significant defect causes stick drift.

70. Defendant’s omissions and representations were likely to mislead a consumer acting reasonably under the circumstances. Video game players are concerned about the functionality of their controllers as video games cannot be played without them and would, therefore, find it material if a controller enhanced game play or, in contrast, contained a defect that rendered the controller unfit for its ordinary purpose.

71. Defendant’s failure to disclose the stick drift was also unfair, because it causes

1 substantial injury to consumers without any countervailing benefit. To market and price a
2 controller as a superior, platform-enhancing product while concealing the joystick contains a
3 defect that interferes with gameplay is unethical and unscrupulous.

4 72. The aforementioned conduct is and was deceptive and false. Defendant's wrongful
5 conduct caused Plaintiff and the Class to suffer consumer-related injuries by causing them to pay
6 more for a product than it was worth, and to spend money and time attempting to repair the
7 defect, and/or purchase a controller without the defect.

8 73. Defendant made the claims willingly and knowingly, despite consumer
9 complaints dating to at least 2014.

10 74. Defendant alone possessed material information about the defect in the form of
11 pre-market testing, complaints, warranty requests and other information not available to Plaintiff
12 nor the Class.

13 75. Defendant's violations present a continuing risk to Plaintiff and the general
14 public. Defendant's unlawful acts and practices complained of herein affect the public interest
15 and are likely to be repeated.

16 76. As a direct and proximate result of Defendant's violations of the above, Plaintiff
17 and Class Members suffered damages including, but not limited to: (1) paying more for wireless,
18 Microsoft Xbox One controllers than they were worth and more than Plaintiff and Class
19 Members would have had they known of the defect, (2) paying out of pocket attempting to repair
20 the defect and/or for replacement controllers; and (3) lost time addressing the defect.

21 77. Plaintiff, individually and on behalf of the Class, seeks relief in the form of
22 injunctive relief, actual damages, treble damages, and reasonable attorneys' fees, pursuant to
23 Wash. Rev. Code § 19.86.090.

24 **VII. DEMAND FOR JURY TRIAL**

25 Plaintiff demands a trial by jury of all claims so triable.
26

VIII. REQUEST FOR RELIEF

WHEREFORE, Plaintiff, individually and on behalf of the other members of the Class proposed in this Complaint, respectfully requests that the Court enter judgment in their favor and against Microsoft, as follows:

- a. Certifying this action as a class action, with the Class as defined above;
- b. Appointing Plaintiff as representative of the Class;
- c. Appointing Plaintiff's counsel as counsel for the Class;
- d. Issuing proper notice to the Class at Microsoft's expense;
- e. Enjoining the unlawful acts and practices described herein;
- f. Awarding compensatory damages – including for overpayment at the point of sale, out of pocket expenses to address the defect, and for lost time addressing the defect – to Plaintiff and the members of the Class in an amount according to proof at trial;
- g. Awarding treble damages to Plaintiff and the members of the Class in an amount according to proof at trial;
- h. Awarding prejudgment interest on the monies wrongfully obtained by Microsoft from the date of collection through the date of entry of judgment in this action;
- i. Awarding attorneys' fees, expenses, and recoverable costs reasonably incurred in connection with the commencement and prosecution of this action to Plaintiff and the members of the Class to the extent permitted by CPA § 19.86.090 or other applicable law; and
- j. Awarding Plaintiff and the Class such other and further relief as this Court deems just and proper.

1 DATED this 28th day of April, 2020.

2
3 Respectfully submitted,

4
5 BRESKIN JOHNSON & TOWNSEND, PLLC

6 By: s/ Cynthia Heidelberg
7 Cindy Heidelberg, WSBA #44121
8 1000 Second Avenue, Suite 3670
9 Seattle, WA 98104
(206) 652-8660 Fax (206) 652-8290
cheidelberg@bjtlegal.com

10 Nicholas A. Migliaccio (*pro hac vice* anticipated)
11 Jason S. Rathod (*pro hac vice* anticipated)
12 **MIGLIACCIO & RATHOD LLP**
13 412 H Street NE, Ste. 302
14 Washington, DC 20002
15 Tel: (202) 470-3520
16 nmigliaccio@classlawdc.com
17 jrathod@classlawdc.com
18
19
20
21
22
23
24
25
26